

**COMMONWEALTH OF MASSACHUSETTS  
DEPARTMENT OF TELECOMMUNICATIONS AND ENERGY**

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Investigation by the Department of Telecommunications  
and Energy on its own Motion into the Appropriate  
Regulatory Plan to succeed Price Cap Regulation for  
Verizon New England, Inc. d/b/a Verizon Massachusetts'  
intrastate retail telecommunications services in  
the Commonwealth of Massachusetts

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D.T.E. 01-31-Phase I

October 16, 2001

HEARING OFFICER RULING ON MOTION BY AT&T COMMUNICATIONS OF NEW  
ENGLAND, INC. TO STRIKE PARTS OF THE TESTIMONY OF ROBERT MUDGE  
AND MICHAEL J. DOANE, OR, IN THE ALTERNATIVE, FOR LEAVE TO FILE  
SURREBUTTAL AFTER DISCOVERY, IF WARRANTED, AND MOTION BY AT&T  
COMMUNICATIONS OF NEW ENGLAND, INC. TO FILE SURREBUTTAL  
TESTIMONY IN RESPONSE TO THE REBUTTAL TESTIMONY OF  
WILLIAM E. TAYLOR

I. INTRODUCTION

Pursuant to the schedule established at the July 9, 2001 procedural conference, on September 21, 2001, Verizon New England, Inc. d/b/a Verizon Massachusetts ("Verizon") filed with the Department of Telecommunications and Energy ("Department") the rebuttal testimony of its witnesses, Robert Mudge, Michael J. Doane, and William E. Taylor.<sup>1</sup> On October 3, 2001, AT&T Communications of New England, Inc. ("AT&T") filed two separate motions in response to Verizon's rebuttal testimony: 1) Motion to Strike Parts of Verizon's Rebuttal Testimony of Robert Mudge and Michael J. Doane, Or, In the Alternative, for Leave to File Surrebuttal After Discovery, if Warranted ("AT&T Motion to Strike"); and 2) Motion to File Surrebuttal Testimony in Response to the Rebuttal Testimony of William E. Taylor ("AT&T Motion to File Surrebuttal"). On October 10, 2001, Network Plus, Inc. filed comments in support of AT&T's Motion to Strike ("Network Plus Comments"). On October 11, 2001, Verizon filed a response to both of AT&T's motions ("VZ Response"). Also on October 11, 2001, the Attorney General for the Commonwealth of Massachusetts ("Attorney General" or "AG") filed comments in support of AT&T's request to file surrebuttal testimony.

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<sup>1</sup> In its rebuttal filing, Verizon included a comprehensive "Massachusetts Competitive Profile" consisting of information detailing competitive activity in each Verizon central office in Massachusetts (Rebuttal Testimony of Robert Mudge, Att. 1).

## II. STANDARD OF REVIEW

The Department's procedural rule, 220 C.M.R. § 1.06(6)(b)(1), authorizes the presiding officer to establish a detailed schedule for proceedings, including, but not limited to, dates for the filing of information requests and responses, evidentiary hearings, and for the filing of testimony and briefs. In addition, 220 C.M.R. § 1.06(6)(b)(1) authorizes the presiding officer to address any procedural matters that will aid in the orderly disposition of the case.

## III. POSITIONS OF THE PARTIES

### A. AT&T

In its Motion to Strike, AT&T argues that portions of the rebuttal testimony of Verizon witnesses, Robert Mudge ("Mudge") and Michael J. Doane ("Doane"), should be stricken from the record (AT&T Motion to Strike at 2). AT&T argues that the Massachusetts Competitive Profile attached to the Mudge rebuttal testimony and discussed in the Doane rebuttal testimony presents an entirely new direct case for the Department to review and is procedurally improper at this stage of the proceeding (id. at 2-3). AT&T argues that Verizon's filing of this new evidence is a concession by Verizon that its case-in-chief was deficient and is an attempt by Verizon to manipulate the schedule and process (id.). AT&T asserts that the purpose of rebuttal testimony is to provide a party with an opportunity to demonstrate the inaccuracies in other parties' testimonies, and cannot be used by Verizon as an opportunity to cure fatal defects in its own direct case (id. at 3-4). AT&T moves to strike the following portions of the Mudge and Doane rebuttal testimonies: 1) the Massachusetts Competitive Profile attached to the Mudge rebuttal testimony; 2) page 1, lines 10-15; page 2, line 6, through page 4, line 8; and Attachment 1 of the Mudge rebuttal testimony; and 3) page 10, line 10, through page 18, line 19; and page 20, lines 10-19 of the Doane rebuttal testimony (id. at 4-5).

In the alternative, AT&T moves to amend the procedural schedule to allow for discovery on Verizon's rebuttal filing, and to allow for the filing of surrebuttal testimony, if AT&T and other parties deem it warranted after discovery and full review (id. at 5). AT&T further requests that Verizon be required to certify that its case is complete and will not be supplemented by any additional information (id. at 5-6).

In its Motion to File Surrebuttal, AT&T requests that the Department amend the procedural schedule in this proceeding to allow AT&T to file surrebuttal testimony in response to the rebuttal testimony of Verizon's witness, William E. Taylor ("Taylor") (AT&T Motion to File Surrebuttal at 1). AT&T argues that in Verizon's rebuttal testimony, Taylor mischaracterizes the analyses that AT&T's witness, John Mayo ("Mayo"), recommends be part of this proceeding, and argues that AT&T should have an opportunity, through surrebuttal, to clarify the record on this point (id. at 1-2). Further, AT&T argues that Taylor's rebuttal testimony inappropriately referred to Mayo's testimony from a FCC proceeding and a prior

Department proceeding, D.P.U. 91-79 (id. at 2). AT&T argues that the use of Mayo's prior testimony in Taylor's rebuttal was incorrect as the earlier proceedings were significantly different than the instant proceeding, and AT&T should have an opportunity in surrebuttal to explain the differences (id.).

In both its Motion to Strike and Motion to File Surrebuttal, AT&T proposes an expansion of the current procedural schedule (Motion to Strike at 5-6; Motion to File Surrebuttal at 3).

B. Network Plus

In its comments, Network Plus supports AT&T's Motion to Strike (Network Plus Comments at 1). Network Plus argues that the Massachusetts Competitive Profile attached to Robert Mudge's rebuttal goes far beyond being rebuttal testimony and includes new evidence purporting to demonstrate that sufficient competition exists to justify deregulation and allow Verizon to escape regulatory scrutiny (id.). Network Plus argues that a fair proceeding requires that this new evidence either be stricken from the record or be open to parties for further investigation (id.). Finding otherwise, argues Network Plus, would condone a litigation strategy in which Verizon attempts to "sandbag" its opponents, leaving them with no opportunity for discovery or response (id.).

C. Attorney General

In his comments, the Attorney General agrees with AT&T that the Department should revise the procedural schedule to allow for the filing of surrebuttal testimony (AG Comments at 1). The Attorney General asserts that revision of the procedural schedule is warranted given the large volume of new evidence provided by Verizon in its rebuttal filing (id.). The Attorney General asserts that if the Department allows surrebuttal, and then permits Verizon to file a reply to the surrebuttal, the Department must require such a reply to be in writing and must allow time for discovery on Verizon's reply prior to the evidentiary hearings (id.). Such a requirement would extend the procedural schedule beyond the end of the year, acknowledges the Attorney General, but argues that such an extension is necessary given the extent of Verizon's filing (id. at 2).

D. Verizon

In its response, Verizon states that it has no objection to AT&T's Motion to File Surrebuttal in response to William E. Taylor's rebuttal, as long as Verizon has the opportunity to file rejoinder testimony to respond to AT&T's surrebuttal (VZ Response at 1). Verizon argues that fairness dictates that it be permitted to respond fully to the cases presented by the other parties and AT&T's motions should not undermine the order of filing testimony (id. at 2). In addition, Verizon argues that AT&T's Motion to Strike should be denied (id. at 2-4).

Verizon asserts that AT&T's position that rebuttal testimony should not include new information is nonsensical since the purpose of rebuttal is to present new facts to rebut another party's assertions (id. at 2-3). Verizon argues that the evidence that AT&T seeks to strike from the record provides updated, back-up detail of the type of data initially cited by Mudge and requested during discovery and is properly within the scope of rebuttal testimony (id. at 3-4). Verizon states that it has no objection to AT&T's alternative motion for leave to propound discovery and file surrebuttal to the Mudge and Doane rebuttals, as long as Verizon also has the ability to propound discovery on and file a rejoinder to the surrebuttal (id. at 4). Verizon proposes a procedural schedule for surrebuttal, discovery, and rejoinder testimony, but suggests that a procedural conference be convened after surrebuttal is filed to establish the hearing dates (id. at 5).

#### IV. ANALYSIS AND FINDINGS

The Department's discretionary practice has been to allow pre-filed testimony in circumstances where it will be helpful to create a complete and accurate record upon which to base findings and rulings, and to focus issues for the evidentiary hearings. See Cablevision of Boston, Inc., D.P.U./D.T.E. 97-82, at 6, Hearing Officer Ruling on Complainants' Motion to Strike and Motion for Leave to File Rebuttal Testimony (February 3, 1998); M.D.T.E. Tariff No. 17, D.T.E. 98-57-Phase I at 3, Hearing Officer Ruling on Verizon Massachusetts' Motion to Amend Procedural Schedule (November 3, 2000). Further, the Department has held that the opportunity for surrebuttal is discretionary and is not required by due process. New England Telephone, D.P.U. 91-63-A at 20, Order on Motion to Compel Discovery, Or, In the Alternative, to Strike Testimony (November 11, 1991).

In its Motion to Strike Parts of the Testimony of Robert Mudge and Michael J. Doane, AT&T argues that the Massachusetts Competitive Profile attached to the rebuttal testimony of Verizon's witness, Robert Mudge, and referred to in the rebuttal testimony of Verizon's witness, Michael J. Doane, is new information to the extent that it constitutes a new direct case and, thus, is procedurally improper at this stage and must be struck from the record (AT&T Motion to Strike at 2-3). I disagree. Pursuant to the Department's Interlocutory Order on Scope, the issues upon which the Department and the parties must focus in this phase of the proceeding are an investigation into the levels of competition, the specific standard of review, and the necessary Department findings regarding sufficient competition. D.T.E. 01-31, at 17 (June 21, 2001). While Verizon's Massachusetts Competitive Profile was not part of Verizon's initial alternative regulation filing, and is more in the nature of an amplification of Verizon's direct case rather than narrowly defined rebuttal testimony, it is offered by Verizon as support for its initial filing, and does not raise new issues for the Department to review. I determine that Verizon's Massachusetts Competitive Profile and related rebuttal testimony serves the Department's objective expressed in the Interlocutory Order on Scope. I further determine that the Massachusetts Competitive Profile and the Mudge and Doane rebuttal testimonies will be beneficial in creating a complete and accurate record upon which to base findings and rulings in

this phase of the proceeding, and will aid in focusing the issue of competition for treatment in the upcoming evidentiary hearings. Therefore, AT&T's Motion to Strike Parts of the Testimony of Robert Mudge and Michael J. Doane is denied.

However, I do agree with AT&T, Network Plus, and the Attorney General that Verizon's Massachusetts Competitive Profile is voluminous and necessitates detailed review by opposing parties as well as Department Staff. I further agree with AT&T and others that permitting additional discovery and the opportunity for intervenors to file surrebuttal testimony in response to the Massachusetts Competitive Profile and the Mudge and Doane rebuttals is warranted. Allowing this additional discovery and specific surrebuttal testimony not only will assist in creating a complete and accurate record and concentrate the disputed areas for treatment during the evidentiary hearings, but also is justified due to the extensive nature and timing of the Verizon filing. In addition, I agree with Verizon that filing of narrowly focused rejoinder testimony in response to the surrebuttal is appropriate. Therefore, AT&T's alternative Motion for Leave to File Surrebuttal after Discovery in response to the Mudge and Doane rebuttals is granted in part and denied in part. A revised procedural schedule is set forth below.

Turning to AT&T's next motion, AT&T also requests leave to file surrebuttal in response to the rebuttal testimony of Verizon's witness, William E. Taylor, filed with the Department on September 21, 2001 (AT&T Motion to File Surrebuttal at 1). AT&T argues that the Taylor rebuttal "mischaracterizes and misuses" the testimony of AT&T's witness, John Mayo (*id.* at 1-2). Although AT&T will have the opportunity to address these concerns "on the record" through direct and cross-examination during the evidentiary hearings, I determine that surrebuttal from the intervenors and narrow rejoinder testimony from Verizon will be helpful in concentrating the disputed areas concerning the Mayo and Taylor positions. Therefore, AT&T's Motion to File Surrebuttal in Response to the Rebuttal Testimony of William E. Taylor is granted in part and denied in part, consistent with the procedural schedule set forth below.

As noted above, in order to accommodate the opportunity for additional discovery, the filing of intervenors' surrebuttal testimony, and Verizon's rejoinder testimony, the procedural schedule must be amended. The schedule is hereby amended as follows:

October 31, 2001	Surrebuttal testimony due
November 13, 2001	Verizon rejoinder testimony due
November 26, 2001	Open discovery period ends

December 17- December 28, 2001	Evidentiary hearings
January 4, 2002	Record requests due
January 17, 2002	Initial briefs due
February 7, 2002	Reply briefs due

V. RULING

AT&T's Motion to Strike Parts of the Testimony of Robert Mudge and Michael J. Doane is denied. AT&T's Motion for Leave to File Surrebuttal after Discovery in Response to the Rebuttal Testimony of Robert Mudge and Michael J. Doane is granted in part, and denied in part. AT&T's Motion to File Surrebuttal in Response to the Rebuttal Testimony of William E. Taylor is granted in part, and denied in part. The procedural schedule for this proceeding is amended as indicated above.

Under the provisions of 220 C.M.R. § 1.06(6)(d)(3), any party may appeal this Ruling to the Commission by filing a written appeal with supporting documentation within five (5) days of this Ruling. Any appeal must include a copy of this Ruling.

Date: October 16, 2001

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Paula Foley, Hearing Officer